

provides comparative data across each manufacturer's entire product line.

The U.S. Court of Appeals for the D.C. Circuit has also recognized that a collection of information may be found likely to cause substantial competitive harm even if some of the individual pieces of data are not independently entitled to confidential treatment. See *Trans-Pacific Policing Agreement v. United States Customs Service*, 177 F.3d 1022 (D.C. Cir. 1999).¹² See also *Center for National Security Studies, et. al. v. U.S. Dept. of Justice*, 331 F.3d 918 (D.C. Cir. 2003) (finding that Exemption 7 protects a comprehensive list of names and other personal information even though individual pieces of information have been otherwise revealed). We further note that the D.C. Circuit has acknowledged that potential consumer misuse, with competitive consequences, is a legitimate factor to consider when determining the confidentiality of the information required to be submitted to the agency. See *Worthington Compressors v. Costle*, 662 F.2d 45, 52 n.43 (D.C. Cir. 1981) (trial court should consider "whether competitors or consumers may misuse the information to the detriment" of the submitters' competitive positions).¹³

NHTSA has consistently recognized the importance of providing accurate (and complete) information to the public about motor vehicle safety. The agency issues Consumer Advisories to help instruct consumers on the proper use of automotive products and encourages the public to refer to its New Car Assessment Program (NCAP) when choosing a vehicle to purchase. In developing the NCAP program, the agency expressed its belief that "if consumers have valid comparative information on important motor vehicle characteristics, they will use that information in their vehicle purchase decisions." See 52 FR 31691 (Aug. 21, 1987). The agency has even rescinded certain aspects of its Consumer

Information programs after concluding that the data may mislead consumers and, therefore, will not provide valuable safety information. See 60 FR 32918 (June 26, 1995).

Some of the commenters also raised the possibility that NHTSA's release of early warning information would impair both the agency's ability to obtain this information in the future and the quality of the information that the agency receives. For example, AIAM noted that "[d]espite the manufacturer's intent to the contrary, individuals who prepare field reports may be less thorough or candid if they know that their reports will be available to the general public and not just to experienced, sophisticated analysts employed by the manufacturer and the government." Similarly, TIA asserted that, under the proposed presumptive categories, submitters "will produce the bare minimum required." TIA added that if the information were protected, submitters "will be more likely to provide robust amounts of data."

The purpose of the TREAD Act's mandate to develop a regulation requiring the submission of the early warning data to the agency is made clear in the language of the law itself. The purpose of the early warning reporting regulation is "to enhance the Secretary's ability to carry out the provisions of this chapter," 49 U.S.C. 30166(m)(1), which includes reducing both the number of traffic accidents and the fatalities and injuries arising from them. (Emphasis added). The Secretary has delegated those responsibilities to NHTSA. See 49 CFR 501.2. The agency's ability promptly to identify safety related defects would not be "enhanced" if disclosure of all or part of the data diminishes the volume and/or reliability of the information, nor would the public interest in motor vehicle safety be served if disclosure has the result of discouraging manufacturers from being responsive to consumer concerns that may relate to motor vehicle safety or imposing greater costs on consumers who need to address such concerns.¹⁴ Therefore, we must consider whether the disclosure of each reporting element has the potential to impair our early detection of possible safety related defects.

The Alliance argued that all early warning data are entitled to confidential treatment under Exemption 4, although both it and General Motors placed

particular emphasis on the confidential nature of warranty information.

Conversely, Public Citizen argued that all of the early warning data should be categorically considered public in order to achieve what it perceives to be the purpose of the TREAD Act—that is, to give the public complete access to the data required pursuant to the TREAD Act so that the public can make its own decisions relating to products. Public Citizen contended that some Members of Congress voted for the TREAD Act only because they believed the information required by it would be publicly available, citing unreported conversations between NHTSA's and Congressional staff.¹⁵ Public Citizen also argued that business interests failed to establish that early warning reporting submissions qualify for blanket confidential treatment under Exemption 4.

We do not believe that Exemption 4 should be applied to the early warning reporting information on a wholesale basis, whether in favor or against disclosure. Instead, we will consider the application of Exemption 4 to each "reporting element" to be submitted under the early warning reporting regulation. In doing so, we consider whether the disclosure of each element of information is either likely to cause substantial competitive harm or likely to impair the agency's ability to obtain necessary information in the future (and thereby impair an important government function). An analysis of the case law applying *National Parks* and its progeny, and discussing the impairment prong in particular, is included as Appendix B.

C. Specific Types of Information To Be Provided Under the Early Warning Regulation

Congress provided for the agency to collect from manufacturers reports of safety related recalls and campaigns conducted outside the United States, and reports relating to claims for deaths

¹² We do not agree with Public Citizen's assertion that the analysis in *Trans-Pacific* is limited to its facts and has no applicability to other, similar situations. *Trans-Pacific* neither compels the protection of the information here, nor does it compel its disclosure. The case supports consideration of any substantial competitive harm arising from the disclosure of a comprehensive compendium of information, even if the disclosure of individual pieces of that compendium are not competitively harmful.

¹³ NHTSA has long maintained that public embarrassment per se (that is, in the absence of substantial competitive harm or a deleterious effect on a government program) is not a basis for confidential treatment. The record here, however, provides support that public disclosure of some of the early warning reporting information may lead to mischaracterizations causing substantial competitive harm and may lead to less, rather than more, reporting.

¹⁴ Section 30166(m)(4)(B) provides that "the regulations promulgated by the Secretary under paragraph (1) may not require a manufacturer of a motor vehicle or motor vehicle equipment to maintain or submit records respecting information not in the possession of the manufacturer."

¹⁵ Public Citizen neither provided evidence to support this claim, nor identified those Members who might have voted differently. Further, the analysis in the memo was prepared in response to the October 20, 2000 letter and post-dated the Congressional votes. The TREAD Act passed in the House of Representatives on October 10, 2000 and in the Senate on October 11, 2000. The letter to Secretary Slater was dated October 20, 2000, and the memo was dated October 27, 2000. The TREAD Act was signed into law on November 1, 2000. The memo was placed in the public docket in March 2001. There is no reference to the memo in the Congressional record. Nor are we aware of any public dissemination of the memo, or its analysis, prior to its placement in the docket approximately five months after the TREAD Act was passed.